Michael Edmund Burke
Attorney at Law
CSB #98925
105 West F Street, 4th Floor
San Diego, CA 92101
Telephone:(619) 234-2503

Attorneys for Defendant, JORGE HERNANDEZ

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE IRMA E. GONZALEZ)

UNITED STATES OF AMERICA,	)	Case No.07-CR-2953-IEG
Plaintiff,	)	Date: 3/3/2008 Time: 2:00 p.m.
v.	)	
JORGE HERNANDEZ,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTIONS
Defendant.	)	

Defendant, JORGE HERNANDEZ, by and through counsel, Michael Edmund Burke, hereby submits the following memorandum of points and authorities in support of his motions.

//

//

//

//

//

//

//

//

I

THIS COURT SHOULD DISMISS THE INDICTMENT BECAUSE JORGE HERNANDEZ' DEPORTATIONS ARE INVALID

1. Introduction.

Pursuant to United States v. Mendoza-Lopez, 481 U.S. 828 (1987), JORGE HERNANDEZ enjoys the right to collaterally attack the prior deportation upon which the government relies in the indictment.[1] Id. at 837-39. Accord United States v. Proa-Tovar, 975 F.2d 592, 594 (9th Cir. 1992) (en banc); United States v. Bejar-Matrecios, 618 F.2d 81, 82 (9th Cir. 1980). Under current Ninth Circuit law, this issue is one for the court. United States v. Alvarado-Delgado, 98 F.3d 492, 493 (9th Cir. 1996) (en banc) (validity of prior deportation to be determined by the district court), cert. denied, 117 S. Ct. 1096 (1997).

Under Mendoza, "courts must entertain collateral attacks on deportation orders in prosecutions under 8 U.S.C. § 1326 *at least* when defects in the deportation proceeding effectively eliminated the right of the alien to judicial review or rendered the proceeding fundamentally unfair." United States v. Villa-Fabela, 882 F.2d 434, 439 (9th Cir. 1989), overruled on other grounds, Proa-Tovar, 975 F.2d at 595 (italics in original). The Ninth Circuit has also recognized that criminal defendants may also challenge deportations in which the alien was denied procedural protections that do not necessarily deprive the alien of the right to judicial review so long as the alien can show that he or she was prejudiced by the denial. Id. Accord Proa-Tovar, 975 F.2d at 595.

The government bears the burden to prove that the deportation is lawful. United States v. Lopez-Vasquez, 1 F.3d 751, 754 (9th Cir. 1993).

The government appears to rely on the November 20, 1995 deportation to Mexico. The basis, however, for the deportation is unclear from the discovery. Counsel anticipates receipt of additional discovery, including the A-File and the deportation tapes. This motion will be supplemented upon receipt of the anticipated discovery. JORGE HERNANDEZ challenges his alleged prior deportation.

---

[1] Mr. Hernandez refers to allegations in discovery throughout this document without stipulating to the accuracy of same. All arguments herein are presented on an "assuming arguendo" basis

2. THE COURT SHOULD DISMISS THE INDICTMENT BECAUSE HERNANDEZ WAS NOT AFFORDED APPOINTED COUNSEL AT HIS DEPORTATION HEARING

As an essential element of the 8 U.S.C. § 1326 charge, the government alleges that Mr. Hernandez was previously deported. However, Mr. Hernandez was not represented by counsel at his prior deportation proceeding, nor was he ever afforded appointed counsel. Without counsel at his proceeding, Mr. Hernandez was ordered deported and failed to appeal the deportation order. Sentencing Mr. Hernandez to a term of imprisonment based on the results of a deportation proceeding at which he was not represented by counsel is a clear violation of Mr. Hernandez's Sixth Amendment right to counsel.[2]

A. Using a Disposition Pursuant to an Uncounseled Deportation Hearing to Sentence Mr. Hernandez to Prison is a Violation of the Sixth Amendment and the Supreme Court's Precedent in *Alabama v. Shelton.*

In Alabama v. Shelton, 535 U.S. 654 (2002), the Supreme Court held that the Sixth Amendment does not allow the enforcement of a sentence of imprisonment even when the sentence does not result in actual incarceration. The defendant in Shelton was convicted of a misdemeanor without the benefit of appointed counsel. Id. at 658. The court sentenced the defendant to thirty days of jail, but suspended the sentence and placed him on two years of probation. Id. The defendant, therefore, was never incarcerated. Id. at 659. He was, however, at risk of the suspended sentence being activated should he violate the terms of his probation. The Supreme Court held that, under the Sixth Amendment, "a suspended sentence that **may** 'end

[2] Defense counsel recognizes that this Court may find that United States v. Rivera-Sillas, 417 F.3d 1014 (2005) controls, however Mr. Hernandez wishes to preserve the issue for appeal.

up in the actual deprivation of a person's liberty' may not be imposed unless the defendant was accorded 'the guiding hand of counsel' in the prosecution for the crime charged." Id. at 658 (emphasis added) (quoting Argersinger v. Hamlin, 407 U.S. 25, 40 (1972). The Supreme Court explained: "Deprived of counsel when tried, convicted, and sentenced, and unable to challenge the original judgment at a subsequent probation revocation hearing, a defendant in Shelton's circumstances faces incarceration on a conviction that has never been subjected to 'the crucible of meaningful adversarial testing . . . .' The Sixth Amendment does not countenance this result." Id. at 667 (citation omitted).

The holding in Shelton was the logical next step in a line of Supreme Court cases analyzing the Sixth Amendment. In Argersinger v. Hamlin, 407 U.S. 25 (1972), the Supreme Court held that a defendant is entitled to appointed counsel in a misdemeanor case that leads to imprisonment. A few years later, in Scott v. Illinois, 440 U.S. 367 (1979), the Supreme Court confirmed that a defendant is **only** entitled to appointed counsel in a misdemeanor case if he receives actual jail time. In other words, two defendants can be convicted of the same misdemeanor. If one defendant receives a fine and the other receives imprisonment, only the latter's right to counsel pursuant to the Sixth Amendment is triggered. Scott, 440 U.S. at 374 ("We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.").

The Supreme Court recognized in Shelton, however, that the protections of the Sixth Amendment are not simply triggered by immediate, actual imprisonment. Shelton, 535 U.S. at 663. Sequential proceedings cannot be analyzed separately for Sixth Amendment purposes. Id. Indeed, the majority squarely rejected the dissent's contention that the Court need engage in a Sixth Amendment analysis only if the sentence is activated by a probation revocation. Id. at 667. The Supreme Court suggested that there is no set of safeguards that could be provided at the probation revocation stage that would cure the failure to appoint counsel prior to sentencing. Id.; see also id. at 668 n.5 ("[T]he die is usually cast when judgment is entered on an [sic] uncounseled trial record").

Viewed in this light, Mr. Hernandez's trial proceedings constitute sequential proceedings to his uncounseled deportation proceedings and cannot be analyzed separately for Sixth Amendment purposes. Id. Mr. Hernandez was allegedly ordered deported during immigration proceedings at which he was not afforded the benefit of appointed counsel. Sequentially, Mr. Hernandez was charged with violating 8 U.S.C. § 1326, which carries a penalty of up to twenty years in prison and a $250,000 fine. See 8 U.S.C. § 1326(b). An essential element of the alleged offense is that Mr. Hernandez has been previously deported, removed or ordered deported or removed. See, 8 U.S.C. § 1326(a)(1). Consequently, Mr. Hernandez's instant trial proceedings cannot be analyzed separately from the initial deportation proceedings at which he was not afforded counsel.

Pursuant to Argersinger and Scott, the defendant in Shelton had no Sixth Amendment right to counsel during his misdemeanor proceedings. However, Mr. Hernandez is not arguing that he had a Sixth Amendment right to counsel at his deportation hearing.[3] He acknowledges that his deportation proceedings are analogous to the trial court proceedings in Shelton in that, for Sixth Amendment purposes, his deportation was just as lawful as the conviction suffered by the defendant in Shelton.[4] However, like the defendant in Shelton, Mr. Hernandez was subject to an adjudication -- a legal disposition -- without the aid of counsel. The Supreme Court held that the defendant in Shelton could not be sentenced to imprisonment based on such a disposition. Alabama v. Shelton, 535 U.S. 654 (2002). Likewise, Mr. Hernandez cannot be sentenced to imprisonment based on a disposition that took place subsequent to a deportation hearing conducted without the aid of counsel. Id. Therefore, the indictment should be dismissed.

---

[3] Mr. Hernandez does not raise the argument here that his procedural due process rights require that an attorney be present at a deportation hearing. Mr. Hernandez acknowledges that such arguments have been raised before and rejected by the Ninth Circuit. United States v. Lara-Aceves, 183 F.3d 1007 (9th Cir. 1999).

[4] Assuming, arguendo, that there were no due process violations with his deportation hearing, Mr. Hernandez's order of deportation remains lawful despite his not being afforded counsel at the hearing.

B. Lara-Aceves Does Not Apply Because Mr. Hernandez is Not Contending That There is a Sixth Amendment Right to Have an Attorney Appointed at a Deportation Hearing.

In United States v. Lara-Aceves, 183 F.3d 1007, 1012 (9th Cir. 1999) (overruled on other grounds by United States v. Rivera-Sanchez, 247 F.3d 905 (9th Cir. 2001) (en banc)) the Ninth Circuit held that any right to counsel that a defendant may have at a deportation hearing is grounded not in the Sixth Amendment but in the Fifth Amendment guarantee of due process. (citing Magallanes-Damian v. INS, 783 F.2d 931, 933 (9th Cir. 1986)). However, Mr. Hernandez is not arguing that his Sixth Amendment right to counsel attaches to a deportation hearing nor that his due process rights at a deportation hearing arise to a level requiring the appointment of counsel. Thus, Lara-Aceves is inapposite to Mr. Hernandez' motions, and the Court must nevertheless dismiss the indictment.

C. Mr. Hernandez Was Prejudiced By The Defects In His Deportation Hearing, including the IJ's failure to advise Mr. Hernandez of plausible avenues of relief

JORGE HERNANDEZ "only needs to show that he has plausible grounds for relief." United States v. Jimenez-Marmolejo, 104 F.3d 1083, 1086 (9th Cir. 1996). The discovery provided thus far does not reveal any advisals by the Immigration Judge ("IJ").

It should be noted that discovery and investigation are continuing as counsel has outstanding discovery requests and is presently investigating. Counsel will seek leave to supplement this motion upon receipt of further information through investigation as well as pursuant to our discovery requests.

//

//

//

//

II

MR. HERNANDEZ' ALLEGED STATEMENTS MUST BE SUPPRESSED, EITHER PURSUANT TO *MIRANDA v. ARIZONA* OR BECAUSE OF ACTUAL INVOLUNTARINESS

A. The Government Must Demonstrate Compliance With *Miranda*.

Mr. Hernandez moves for suppression of all alleged statements to Immigration agents. Statements may have been elicited without the benefit of Miranda statements are likewise inadmissible because they were involuntary. Pursuant to the Fifth and Sixth Amendments and 18 U.S.C. § 3501, this Court should suppress the statements outright. In the alternative, a hearing should be ordered.

1. *Miranda* Warnings Must Precede Custodial Interrogation.

The Supreme Court has held that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from a custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. See Miranda v. Arizona, 384 U.S. 436, 444 (1966). The law imposes no substantive duty upon the defendant to make any showing other than that the statement was taken from the defendant during custodial interrogation. Id. at 476. Custodial interrogation is questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. Id. at 477; see Orozco v. Texas, 394 U.S. 324, 327 (1969). In Stansbury v. California, the Supreme Court clarified its prior decisions by stating that "the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." 511 U.S. 318, 323 (1994). The Ninth Circuit has held that a suspect will be found to be in custody if the actions of the interrogating officers and the surrounding circumstances, fairly construed, would reasonably have led him to believe he could not freely leave. See United States v. Lee, 699 F.2d 466, 468 (9th Cir. 1982); United States v. Bekowies, 432 F.2d 8, 12 (9th Cir. 1970). In determining whether a person is in custody, a reviewing court must consider the language used to summon the defendant, the physical surroundings of the interrogation, and the extent to which the defendant is confronted with evidence of his guilt. See United States v. Estrada-Lucas, 651 F.2d 1261 (9th Cir. 1980).

Once a person is in custody, Miranda warnings must be given prior to any interrogation. In United States v. Leasure, the Ninth Circuit held that "custody," for the purposes of Miranda warnings, usually begin at the point of secondary inspection in border cases. 122 F.3d 837, 840 (9th Cir. 1997). Miranda warnings must advise the defendant of each of his or her "critical" rights. See United States v. Bland, 908 F.2d 471, 473 (9th Cir. 1990). Furthermore, if a defendant indicates that he wishes to remain silent or requests counsel, the interrogation must cease. See Miranda, 384 U.S. at 473-74; see also Edwards v. Arizona, 451 U.S. 477, 482 (1981).

2. The Government Must Demonstrate That Mr. Hernandez's Alleged Waiver Was Voluntary, Knowing, And Intelligent.

For a defendant's inculpatory statements to be admitted into evidence, the defendant's "waiver of Miranda rights [during custodial interrogation] must be voluntary, knowing and intelligent." United States v. Binder, 769 F.2d 595, 599 (9th Cir. 1985) (citing Miranda 384 U.S. at 479), overruled on other grounds by United States v. Morales, 108 F.3d 1031 (9th Cir. 1997) (en banc); see also United States v. Vallejo, 237 F.3d 1008, 1014 (9th Cir. 2001); Schneckloth v. Bustamonte, 412 U.S. 218 (1973). When interrogation continues in the absence of an attorney, and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant intelligently and voluntarily waived his privilege against self-incrimination and his right to retained or appointed counsel. See Miranda, 384 U.S. at 475. The Ninth Circuit has held, "[t]here is a presumption against waiver." United States v. Garibay, 143 F.3d 534, 536-37 (9th Cir.1998) (citing United States v. Bernard S., 795 F.2d 749, 752 (9th Cir. 1986)) (other internal citations omitted); see also United States v. Heldt, 745 F.2d 1275, 1277 (9th Cir. 1984) (stating that the court must indulge every reasonable presumption against waiver of fundamental constitutional rights) (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

The validity of the waiver depends upon the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused. See

Edwards, 451 U.S. at 482; Zerbst, 304 U.S. at 464; see also Garibay, 143 F.3d at 536; see also Bernard S., 795 F.2d at 751 (stating that "[a] valid waiver of Miranda rights depends upon the totality of the circumstances, including the background, experience and conduct of the accused"). A determination of the voluntary nature of a waiver "is equivalent to the voluntariness inquiry [under] the [Fifth] Amendment." Derrick v. Peterson, 924 F.2d 813, 820 (9th Cir. 1990).

A determination of whether a waiver is knowing and intelligent, on the other hand, requires a reviewing court to discern whether "the waiver [was] made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it." Id.; see also United States v. Amano, 229 F.3d 801, 805 (9th Cir. 2000); Garibay, 143 F.3d at 536. This inquiry requires that a court determine whether "the requisite level of comprehension" existed before the purported waiver may be upheld. Derrick, 924 F.2d at 820. Thus, "[o]nly if the `totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived." Id. (citations omitted).

Unless and until Miranda warnings and a knowing and intelligent waiver are demonstrated by the prosecution, no evidence obtained as result of the interrogation can be used against the defendant. See Miranda, 384 U.S. at 479.

B. Mr. Hernandez's Statements Were Involuntary.

Even when the procedural safeguards of Miranda have been satisfied, a defendant in a criminal case is deprived of due process of law if his conviction is founded upon an involuntary confession. See Arizona v. Fulminante, 499 U.S. 279 (1991); Jackson v. Denno, 378 U.S. 368, 387 (1964). The government bears the burden of proving that a confession is voluntary by a preponderance of the evidence. See Lego v. Twomey, 404 U.S. 477, 483-84 (1972).

A voluntary statement must be the product of a rational intellect and free will. See Blackburn v. Alabama, 361 U.S. 199, 208 (1960). In determining the voluntariness of a confession, the Ninth Circuit has required consideration of "whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution." United States v. Bautista-Avila, 6 F.3d 1360, 1364 (9th Cir. 1993) (citations omitted); see also Bustamonte, 412 U.S. at 226. Factors a reviewing court should consider when determining voluntariness include the youth of the accused, lack of education, low intelligence, the absence of any advice regarding the accused's constitutional rights, the length of the detention, the repeated and prolonged nature of the questioning, and the use of physical punishment, such as the deprivation of food or sleep, to determine if law enforcement officers elicited a voluntary confession. See Bustamonte, 412 U.S. at 226.

In general, a statement is considered involuntary if it is "extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influence." Hutto v. Ross, 429 U.S. 28, 30 (1976) (per curiam) (quoting Bram v. United States, 168 U.S. 532, 542-43 (1897)); see also United States v. Tingle, 658 F.2d 1332, 1335 (9th Cir. 1981) (agent's express statement that defendant would not see her child "for a while" and warning that she had "a lot at stake", referring specifically to her child, were patently coercive and defendant's resultant confession held involuntary).

C. This Court Should Conduct an Evidentiary Hearing.

This Court must conduct an evidentiary hearing to determine whether Mr. Hernandez's statements should be admitted into evidence. Under 18 U.S.C. § 3501(a), this Court is required to determine, outside the presence of the jury, whether any statements made by Mr. Hernandez are voluntary. In addition, 18 U.S.C. § 3501(b) requires this Court to consider various enumerated factors, including Mr. Hernandez's understanding of his rights and of the charges against him. Without the presentation of evidence, this Court cannot adequately consider these statutorily mandated factors.

Moreover, § 3501(a) requires this Court to make a factual determination. If a factual determination is required, courts must make factual findings by Fed. R. Crim. P. 12. See United States v. Prieto-Villa, 910 F.2d 601, 606-10 (9th Cir. 1990). Since "'suppression hearings are often as important as the trial itself,'" id. at 609-10 (quoting Waller v. Georgia, 467 U.S. 39, 46 (1984)), these findings should be supported by evidence, not merely an unsubstantiated recitation of purported evidence in a prosecutor's responsive pleading.

III

THE INDICTMENT MUST BE DISMISSED BECAUSE THE INDICTMENT FAILS TO ADEQUATELY SET FORTH THE LOCATION OF THE ALLEGED OFFENSE

The Fifth Amendment of the United States Constitution "requires that a defendant be convicted only on charges considered and found by a grand jury." United States v. Du Bo, 186 F.3d 1177, 1179 (9th Cir. 1999). An indictment's failure to allege an essential element of the charged offense "is not a minor or technical flaw subject to harmless error analysis, but a fatal law requiring dismissal of the indictment." *Id.* The Ninth Circuit has held that even "implied, necessary elements, not present in the statutory language, must be included in an indictment." United States v. Jackson, 72 F.3d 1370, 1380 (9th Cir. 1995).

The indictment in the instant case charges Mr. Hernandes with attempted entry after deportation in violation of 8 U.S.C. § 1326(a) and (b). Nowhere in the indictment is a location described which would put Mr. Hernandez on notice as to where, within the Southern District of California, he allegedly attempted to enter the United States. The Supreme Court, in United States v. Resendiz-Ponce, 127 S. Ct. 782 (2007), reversed the 9th Circuit Court of Appeals, which had held that "[t]he crime of attempted unlawful entry into the United States, as defined by 1326, includes, as an essential element, that defendant committed overt act that was a substantial step toward reentering."[5] The Supreme Court, however, found that there was sufficient notice as the indictment in Resendiz-Ponce explicitly set forth the location of the attempted illegal entry as "at or near San Luis in the District of Arizona after having been previously denied admission, excluded, deported, and removed from the United States at or near Nogales, Arizona, on or about October 15, 2002 - -." Id. at 786. As held by the Supreme Court:

> An indictment has two constitutional requirements: "first, [it must] contai[n] the elements of the offense charged and fairly infor[m] a defendant of the charge against which he must defend, and, second, [it must] enabl[e] him to plead an

[5] See United States v. Resendiz-Ponce, 425 F.3d 729, 731 (9th Cir. 2005)

> acquittal or conviction in bar of future prosecutions for the same offense." Hamling, 418 U.S., at 117, 94 S.Ct. 2887. Here, the use of the word "attempt," coupled with the specification of the time and place of the alleged reentry, satisfied both.
>
> Id. at 784.

In the present case, the indictment's failure to adequately allege an specific location of the attempted entry or the deportation renders the indictment fatally flawed.[6] The indictment is, therefore, defective and must be dismissed.

IV

THE INDICTMENT MUST BE DISMISSED BECAUSE THE INDICTMENT FAILS TO ADEQUATELY SET FORTH THE DATE OF THE ALLEGED REMOVAL

As noted in the previous discussion of Resendiz-Ponce, supra, the Supreme Court overruled the Ninth Circuit Court of Appeals, in part because the defense was placed sufficiently on notice that the defendant had "- - been previously denied admission, excluded, deported, and removed from the United States at or near Nogales, Arizona, **on or about October 15, 2002 - -**." Id. at 786. [emphasis added] The Ninth Circuit recently found Apprendi error where "neither the date of his prior removal nor the temporal relationship between the removal and his prior conviction was alleged in the indictment and proved to a jury." United States v. Salazar-Lopez, 506 F.3d 748, 751 (9th Cir. 2007). The "- - Government never alleged in the indictment that he had been removed on a specific, post-conviction date." Ibid. "Such a conviction was required." Ibid.[7]

Here, the indictment is clearly defective in failing to specify the date of the removal.

---

[6] The deportation is even more vague as to location than the alleged illegal entry, as only the latter was alleged to have occurred within the Southern District of California. The vagueness of either is sufficient to warrant dismissal.

[7] In Salazar, supra, the "harmless error" standard was applied, as the objection was made "only at the conclusion of his trial." Id. at 755 As a result, the error was found to "harmless." Id. at 755

Therefore, the indictment must be dismissed.

V

THE INDICTMENT IS DEFECTIVE BECAUSE IT FAILS TO ALLEGE THE PRIOR CONVICTION OR THE TEMPORAL RELATIONSHIP BETWEEN THE PRIOR CONVICTION AND REMOVAL

Salazar, supra, at 751, held, citing Covian, supra, that "an Apprendi error had occurred where the date of a prior removal (necessary to determine whether the removal had *followed* the conviction in time) was not admitted by the defendant or found by the jury." The Ninth Circuit, in Salazar, supra, at 756, concluded that "the temporal relationship between Salazar-Lopez's removal and his prior conviction should have been alleged in the indictment and proved to the jury..". [8]

Here, the indictment makes no reference a prior felony conviction. As for the removal, the indictment alleges only that Mr. Hernandez was "- - removed from the United States subsequent to February 1, 2002." Clearly, the indictment completely fails to allege the temporal relationship between the prior conviction and the removal. Since the indictment is defective in failing to set forth all of the elements of 8 U.S.C. 1326(b), this fatal flaw requires dismissal of the indictment. See Du Bo, supra, at 1179.

VI

THE INDICTMENT MUST BE DISMISSED BECAUSE THE INDICTMENT FAILS TO ALLEGE THE NECESSARY *MENS REA* AS TO EACH OF THE ELEMENTS OF THE CHARGED OFFENSE

The indictment does not contain an allegation of *mens rea*. In other words, there are no allegations that Mr. Hernandez knew he was in the United States, that he knew he was an alien,

[8] Recently, in an unpublished memorandum which is being cited pursuant to Ninth Circuit Rule 36-3,the Ninth Circuit reversed the District Court, where the defense made a timely objection to an indictment which failed to allege all the elements of 1326(b). "Noticeably absent from the indictment was any allegation that Delgado's deportation/removal was subsequent an aggravated felony conviction, 18 U.S.C. §1326(b)(2). United States v. Delgado, 2008 WL 344736 (9th Cir. 2008)

that he knew he had been previously deported or that he knew he lacked the Attorney General's permission to reapply to enter the United States. The elements of a attempted illegal entry are set forth in Resendiz-Ponce, supra, at 796:

> "(1) the defendant had the purpose, i.e., conscious desire, to reenter the United States without the express consent of the Attorney General; (2) the defendant committed an overt act that was a substantial step towards reentering without that consent; (3) the defendant was not a citizen of the United States; (4) the defendant had previously been lawfully denied admission, excluded, deported or removed from the United States; and (5) the Attorney General had not consented to the defendant's attempted reentry." (internal citations omitted)

The indictment is defective for failing to allege knowledge as to these elements because each of them are necessary to render Mr. Hernandez' otherwise innocent conduct criminal. *See* Carter v. United States, 120 S. Ct. 2159, 2168-69 (2000).

As Carter makes clear, the presumption of scienter applies to each element of an offense that serves "to separate wrongful from otherwise innocent conduct. *Id.* at 2169. Particularly, in light of the "specific intent" *mens rea* requirement which applies in "attempted illegal entry." See, e.g. United States v. Covian-Sandoval, 462 F.3d 1090 (9th Cir. 2006)("As an inchoate crime, the offense of **attempted** illegal **entry** contains the heightened *mens rea* element of **specific intent**, but nothing about an admission of an **entry** or "found in" offense inherently militates against a finding of **specific intent**."); see also United States v. Pernillo-Fuentes, 252 F.3d 1030 (9th Cir.. 2001).

In addition to the specific intent requirement, at least a general intent, in the form of knowledge, must attach to each such element. Carter, supra,. at 2168-69. Here, it is otherwise innocent for an alien to attempt to enter the United States. Even a deported alien may enter. It is only when the deported alien lacks permission that the conduct becomes wrongful. Thus, under Carter, the government must allege and prove, in addition to the specific intent to attempt to enter, knowledge of alienage, deportation, and lack of permission. *Id.*

The government will likely contend that it need not comply with the dictates of Carter because the Ninth Circuit has essentially treated section 1326 as a strict liability offense, requiring, as if a 20 year felony was like a speeding ticket, nothing more than a voluntary act. *See, e.g.*, Pena-Cabanillas v. United States, 394 F.2d 785 (9th Cir. 1968). Assuming, arguendo, that the Ninth Circuit has properly held that Pena-Cabanillas, the basis for the Ninth Circuit's 1326 *mens rea* Jurisprudence, survived the Supreme Court's dramatic expansion of the circumstances under which it implies *mens rea*, Carter has finally laid it to rest.[9]

The Supreme Court's post Pena-Cabanillas approach to *mens rea* questions is set forth in Staples, 511 U.S. 600, which addressed the *mens rea* requirement for the offense of possessing a machine gun in violation of 26 U.S. C. § 5861 (d). Observing that statutory silence "does not necessarily suggest that Congress intended to dispense with a conventional *mens rea* element, which would require that the defendant know the facts that make his conduct illegal," 511 U.S. at 605, Staples found that "[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Id.* (citing United States v. United States Gypsum Co., 438 U.S. 422 (1978) and Morissette v. United States 342 U.S. 246 (1952)); accord Carter, 120 S. Ct. at 2169; United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994); Liparota v. United States, 471 U.S. 419, 426 (1985). in rejecting the government's claim that the firearm statute was a public welfare offense traditionally exempt from the *mens rea* requirement, the Court referred to several characteristics of the gun statute in requiring *mens rea*. Criminalizing mere possession would "criminalize a broad range of apparently innocent conduct." *Id.* at 610 (citing Liparota v. United States, 471 U.S. 419 (1985)); accord Posters In, Things, Ltd. v. United States, 511 U.S. 513, 523 (1994) ("Even statutes creating public welfare offenses generally require proof that the defendant had knowledge of sufficient facts to alert him to the probability of regulation of his potentially dangerous conduct"). Guns are not subject to a long tradition of regulation such as "deleterious devices or products or obnoxious waste materials." *Id.* at 610-11 (citing United States v. International Minerals & Chemical Corp. 402 U.S. 588 (1971)). While they are potentially dangerous, and subject to significant regulation, guns are not so intrinsically dangerous that the public welfare doctrine applies. *Id.* at 611-12; *see also* Liparota, 471 U.S. at 432-33 (noting that food stamps are not dangerous instrumentalities: "a food stamp can hardly be compared to a hand grenade").

---

[9] Mr. Hernandez believes that Pena-Cabanillas was overruled by several Supreme Court cases over the past 20 years. See, e.g., Staples v. United States, 511 U.S. 600 (1994) (*see* discussion *infra*), but the Ninth Circuit has never squarely addressed these developments.

In contrast to the history of, enforcing public welfare regulations with only fines or short jail sentences, the potentially harsh penalty attached to conviction under the statute in Staples -- up to ten years imprisonment -- was "a significant consideration in determining whether the statute should be construed as dispensing with *mens rea*." *Id.* at 616. Consequently, Staples held that *mens rea* as to the facts that rendered the defendant's conduct unlawful was required.

Pena-Cabanillas failed to adopt the approach later employed in Staples. In concluding that section 1326 has no specific intent requirement, Pena-Cabanillas noted that it was "not based on any common law crime, but is a regulatory statute." 394 F.2d at 788-89.[10] Subsequent Supreme Court decisions have rejected this facile dichotomy, repeatedly imposing *mens rea* requirements in purely statutory offenses, even when those statutes contained no *mens rea* requirements at all. *See, e.g.*, Staples, 511 U.S. 600 (possession of unregistered firearms); Posters In, Things, 511 U.S. 513 (drug paraphernalia) United States Gypsum, 438 U.S. 422 (antitrust violations); *see also* Carter, 120 S. Ct. 2159 (bank robbery statute that was not based on the common law and which contained no explicit *mens rea* requirement);Liparota, 471 U.S. 419 (unlawfully acquiring and possessing food stamps).

Staples and Liparota also compel the conclusion that the public welfare offense doctrine is inapplicable. Even more so than guns, the human beings who are the subject of section 1326's prohibitions are not so intrinsically dangerous that the public welfare doctrine applies. Staples, 511 U.S. at 611-12. Or, to paraphrase Justice Brennan's remark in Liparota "a [human being] can hardly be compared to a hand grenade." 471 U.S. at 433; accord United States v. Nguyen, 73 F.3d 887, 891 n.1 (9th Cir. 1995) (finding that 8 U.S.C. § 1324, alien smuggling, was not, a public welfare offense and noting that such offenses usually involve "potentially harmful or injurious items").

---

[10] As discussed earlier, the instant case clearly requires a showing of specific intent. This argument applies to the scienter requirements of the remaining elements.

Pena-Cabanillas also expressed the view that "[i]t would be absurd for this court to think that Congress inadvertently left 'intent' out of Section 1326." Pena-Cabanillas, 394 F.2d at 790. The Supreme Court, however, has made the "absurd" practice of reading *mens rea* requirements into statutes that do not explicitly set forth such requirements a hallmark of its jurisprudence. *See, e.g.*, Carter, 120 S. Ct. 2159; Staples, 511 U.S. at 618; X-Citement Video, 513 U.S. at 469. In fact, Pena-Cabanillas has got it backward: "Certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement.'" Posters In' Things, 511 U.S. at 522 (quoting United States Gypsum, 438 U.S. at 438); accord Liparota, 471 U.S. at 426 ("the failure of Congress explicitly and unambiguously to indicate whether *mens rea* is required does not signal a departure from [the] background assumption [of *mens rea*]").

Pena-Cabanillas also relied upon the use of *mens rea* requirements in other immigration statutes, arguing that the presence of a *mens rea* requirement in a related statute was evidence that Congress intended to omit the requirement in section 1326. The Supreme Court has rejected similar arguments. *See* Liparota, 471 U.S. at 428-30. In Liparota, the government argued that because one of two related statutes describing offenses involving food stamps contained a particular *mens rea* requirement and the other did not, that Congress necessarily omitted it from the latter. The Supreme Court rejected that argument, finding it insufficiently persuasive to overcome the background presumption of *mens rea*. *Id.*; accord Carter, 120 S. Ct. at 2168-69 (implying *mens rea* requirements into bank robbery statute); Posters In' Things, 511 U.S. 513 (implying *mens rea* requirement in drug paraphernalia offense found in Title 21 even though other Title 21 offenses contain explicit *mens rea* elements).

Finally, Pena-Cabanillas never mentioned the significant criminal penalties imposed under section 1326, two years in prison then, twenty now. The Supreme Court, however, has emphasized that a finding of *mens rea* is strongly supported by the imposition of substantial criminal penalties, particularly imprisonment. In fact, in United States Gypsum, 438 U.S. at 442 n.18, the Supreme Court observed that the "severity of the sanctions" available under the Sherman Act, three years in prison and large fines, supported the conclusion that strict liability was inappropriate. Accord X-Citement Video, 513 U.S. at 469 (10 years); Staples, 511 U.S. at 616-17 (10 years); Nguyen, 73 F.2d at 891 n.1 and 893. In short, Pena-Cabanillas has been thoroughly -- and repeatedly -- undermined.

But even it can be argued that Pena-Cabanillas survived Staples and the numerous Supreme Court cases discussed above, Carter makes it crystal clear that Pena-Cabanillas has been overruled. In Carter, the Supreme Court found that even though a general, not specific, intent requirement was sufficient to differentiate between otherwise innocent and guilty conduct, that general intent was interpreted to be a knowledge requirement, not a mere showing of voluntariness. *See* 120 S. Ct. 2168-69 ("Properly applied to [the bank robbery statute], the presumption in favor of scienter demands only that we read subsection (a) as requiring proof of general intent -- that is, that the defendant possessed knowledge with respect to the *actus reus* of the crime") (emphasis added); accord United- States v. Bailey, 444 U.S. 394, 105 (1980) ("[i]n a general sense, 'purpose' corresponds loosely with the common law concept of specific intent, while 'knowledge' corresponds loosely with the concept of general intent"). Pena-Cabanillas eschewed a "knowledge" requirement, requiring only voluntariness. 394 F.2d at 790. Because Carter makes clear that it is at least knowledge, not mere voluntariness, that serves to satisfy the "demands" of the presumption of *mens rea*, Pena-Cabanillas is no longer good law.

The failure to allege the *mens rea* requirements is fatal to the indictment. *See* United States v. Du Bo, 186 F.3d 1177, 1179-81 (9th Cir. 1999). "The complete failure to charge an essential element of a crime ... is by no means a mere technicality.'" *Id.* at 1180 (quoting United States v. King, 587 F.2d 956, 963 (9th Cir. 1978)). In Du Bo, the defendant challenged the failure to include the *mens rea* requirement in an indictment under the Hobbs Act. The Hobbs Act does not explicitly contain the *mens rea* requirement at issue. Even so, "'implied, necessary elements, not present in the statutory language, must be included in an indictment." *Id.* at 1179 (quoting

United States v. Jackson, 72 F.3d 1370, 1380 (9th Cir. 1995)). Because the implied *mens rea* requirement was not contained in Du Bo's indictment, it was deficient on its face. *Id.*

Due to the lack of the requisite *mens rea*, the Ninth Circuit found that the indictment was defective in two fundamental ways. First, because it lacked an element, the Du Bo court could not be sure that the jury convicted on the same facts presented to the Grand Jury. *Id.* at 1179. The Du Bo court could "only guess whether the grand jury received evidence of, and actually passed on, Du Bo's intent." *Id.*

Second, absent the *mens rea* allegation, the indictment "lacks a necessary allegation of criminal intent, and as such does not 'properly allege an offense against the United States'." *Id.* at 1180 (quoting United States v. Morrison, 536 F. 2d 286, 289 (9th Cir. 1976)). A complete failure to allege an element is generally a fatal defect. *Id.* In Du Bo, the Ninth Circuit held that the failure to allege the *mens rea* requirement was such a defect. *Id.* It, therefore, ordered the indictment dismissed. *Id.* at 1180-81.

This Court should order the same remedy here. The government has failed to allege sufficient *mens rea* as required under Pernillo-Fuentes, supra. The indictment is, therefore, defective and must be dismissed.

VII

LEAVE TO FILE FURTHER MOTIONS

As discovery and investigation are continuing, counsel seeks "Leave to File Further Motions."

Respectfully submitted,

s/Michael Edmund Burke

Dated: February 19, 2008

____
Michael Edmund Burke,
Attorney for Defendant,
JORGE HERNANDEZ